**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 14**

**INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 3, (OTIS ELEVATOR COMPANY)**

**and** **Case 14- CD-156706**

**NATIONAL ELEVATOR BARGAINING ASSOCIATION**

**and**

**MID AMERICA METALS COMPANY AND BSI CONSTRUCTORS**

**INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 3**
**POST 10(K) HEARING BRIEF AND MOTION TO QUASH**

Comes Now the International Union of Elevator Constructors, Local 3 and for its post 10(k) hearing brief in favor of quashing the Notice of Hearing states as follows:

## I. INTRODUCTION

The Charging Party (Otis Elevator) premises its allegation upon infantilizing Local 3 members working at the Lennox Hotel in St. Louis. In pursuing the Charge, the Region has adopted the Charging Party's position. The Charging Party and Region's paternalistic position requires a belief that when citizens are working they must blindly fit into only one of two roles:

(1) they are employees who must follow every employer whim regardless of necessity, safety or relation to the work at hand; or

(2) they are union members who cower in fear of a dictatorial labor functionary.

This is not, and cannot be, the Board's view.

The reality of this case is that three men, Mr. Ronnie Morris, Mr. Matt Boyd and Mr. Vince Langendoerfer, working at the Lennox Hotel in St. Louis made a choice. These three men decided

to not abdicate to one specific demand from one specific supervisor regarding how to leave their work station at the end of the day. In the case of two elevators, the supervisor's request was unnecessary and not part of their positions. As to the remaining elevator, each thought the request was unnecessarily dangerous. These men would not to open doors of an uninspected, unaccepted, and unattended elevator, at different times under each of their control, because each personally believed such an action was unsafe and unnecessary.

The Charging Party is so outraged an employee would not do something he personally believed unsafe that it seeks the federal government's aid to punish their union and modify their collective bargaining agreement. The Board cannot allow itself to be used in the manner the Charging Party demands. Because there is not a "valid jurisdictional dispute" requiring the Board to make a 10(k) award in this case, the Board mush Quash the Notice of Hearing. *See*, Seafarers (Recon Refractory & Construction), 339 NLRB 825 (2003).

## II. STANDARD

To proceed with a dispute determination under 10(k) the Board needs a reasonable cause to believe Section 8(b)(4)(D) has been violated. Laborers' International Union of North America, Local 265 (Henkels & McCoy) 360 NLRB No. 102 (May 5, 2014) citing, Operating Engineers Local 150 (R&D Thiel), 345 NLRB 1137, 1139 (2005). The meaning and requirement of "reasonable cause" is not a nullity.

The standard to find reasonable cause is three pronged:

(1) There are competing claims of rival groups of employees to the disputed work;

(2) A party has used proscribed means to enforce its claim to the work in dispute; and

(3) The parties have not agreed on a method for the voluntary adjustment of the dispute.

National Labor Relations Board Members have previously opined that there is no burden of proof on any party in a Section 10(k) proceeding. Teamsters Local No. 864, 226 NLRB 1127, 1129 (1976). However, because the Charging Party has made allegations requiring an affirmative finding on each of three separate prongs, the burden to establish a dispute should properly be placed upon it. The Charging Party has not, and cannot show either of the first two prongs have been satisfied. The 10(k) notice and hearing must be quashed.

## III. FACTS

### a. Otis and the IUEC

Otis Elevator (hereinafter "Otis" or "Charging Party") is an elevator company that conducts business around the world. Tr. 308. Otis is a member of an employer association called the National Elevator Bargaining Association. Tr. 11, 125. NEBA has a collective bargaining agreement with the International Association of Elevator Constructors, of whom Local 3 is a local body. Ex. E-3; Tr. 49. The collective bargaining agreement is national in scope. Ex. E-3; Tr. 11, 125. It applies equally to all IUEC's locals (excluding New York) and the NEBA signatory contractors for the work described therein. Ex. E-3, Art. I; Tr. 49, 125. There is no separate agreement between Local 3 and Otis that covers the work the Otis has made an issue in this case. Tr. 96. In part relevant to this case, the CBA provides:

- The jurisdiction of the Union's work; [Ex. E-3, Art. IV and VIII(A)][1]
- Grievance procedures [Ex. E-3, Art. XVII, specifically allowing employers to bring grievances]

[1] Art IV, Par. 2(j) reserves for bargaining unit members "The assembly of **all cabs complete**." (emphasis added) Art. VIII(A) as it relates to Modernization work such as the work being done at the Lennox Hotel "any and all work performed on apparatus enumerated in Article IV and IV(A) in any existing or occupied building to bring equipment up to date, **including general repairs which are part of a modernization job**." (emphasis added).

The fact that the IUEC and NEBA contract is national, rather than regional in scope is not unique in the industry. The testifying witnesses traveled widely to perform their work. Tr. 134-135, 152, 224, 236. The other contractors mentioned were each national, or nearly national, in scope. See, Tr. 133, 179, 235. The relevant market area in the elevator industry is nation-wide.

**b. Otis and BSI**

Otis entered into a contract with general contractor BSI to perform "modification" work on four (4) elevators in the Lennox Hotel in St. Louis, Missouri. Ex. E-1; Tr. 17. One of the four elevators, elevator #1, was a freight elevator and is not at issue in this case. Tr. 56. The three remaining passenger elevators, #2, #3, and #4 required work Otis has brought to the Region, and now Board's attention. Tr. 56.

The Otis and BSI contract required:

- Otis to provide union labor and services. [Ex. E-1, *specifically therein*, Art. 2.3; BSI Subcontract Agreement Ex. 1, #13; BSI Subcontract Agreement Ex. 2, #2; and page 8 of the 'Otis Proposal GDS14032402759, Rev. 1], and
- Bronze work finishes to not be performed until after the elevator cabs had been complete [Ex. E-1, *See*, NOTE on § III, Payment Terms]

Regarding the bronze in elevators #2, #3 and #4, Otis, through its consultant Jim Lemp [Tr. 54] offered BSI two (2) options:

(1) Otis could either refinish the existing bronze coverings; or

(2) remove and replace the bronze coverings with new covers. Ex. E-1, p. 142100-18 § 2.7(a)(2)(a); Tr. 109.

There is no testimony these options were presented at BSI's request. BSI chose to refinish the existing bronze; likely because of cost savings Otis presented. Tr. 109.

**c. Otis's unilateral subcontracts to Mid America**

To complete the work necessary in elevators #2, #3, and #4, Otis subcontracted part of its obligations to a third party, Mid America Metals (hereinafter Mid America). Tr. 51-52, 176. Otis's supervisor, manager and agents Steve Phlipot and Brian Hermann chose Mid America to perform this work because Mid America is "cheaper." Tr. 52. For a moment, Mr. Phlipot considered one other polishing company. Tr. 52. He dismissed the other company because of Mid America's "price." Tr. 53. He did not give any other reasons for choosing Mid America.

Local 3 did not know of Mid America's involvement in the Lennox Hotel until the Charging Party brought its Charges to the Region. Tr. 309-310. Mid America's employees are not represented by a labor organization. Tr. 140.

Mid America Metals is not the only option Otis had available to it. There are IUEC signatory contractors who perform metal refinishing work in the elevator industry. Tr. 311-312. Bargaining unit members have required on the job training hours and are given basic instruction and training on how to perform tasks necessary to complete elevator cabs. Ex. 7, p. 1 at "Introduction". Specific hands on skills for IUEC members are regularly given on the job, with only basic knowledge firs taught through formal apprenticeship NEIEP training. Tr. 301. Otis actually performs its own on the job training for aspects of the work not done through NEIEP training. Tr. 124.

An Otis employee at the Lennox Hotel, Gary Krawzik had worked even previously performed bronze and other metal refinishing work for an IUEC signatory contractor. Tr. 235. Steve Phlipot did not consider those contractors, Otis' CBA or the NEPA training standards. Tr.. 52-53. He chose Mid America Metals instead, based upon "price." Tr.53. Mr. Phlipot has no

knowledge of any metal refinishing IUEC signatory contractors. Tr. 84. The effective date of Otis' and Mid America's contract is July 21, 2015. Ex. E-2(b).

**d. Elevators #3 and #4 turned over**

On April 24, 2015 two of the three passenger elevators, #3 and #4, had passed inspection and were "turned over" to the general contractor, BSI, and the Lennox Hotel property owner. Tr. 57. The inspection is "to ensure that the elevators were safe for use" "by the contractor and BSI." Tr. 57. When an elevator is "turned over" after inspection, the property owner takes possession and control of the elevators. Tr. 23-24, 198.

After the elevators are turned over they are safe for the public to use as well. Tr. 58. Before April 24, 2015, neither the general contractor nor the public can use an elevator, including #3 and #4. Tr. 59. This is, as Mr. Phlipot testified, "Because the elevator has not been inspected." Tr. 59.

Before being turned over, the elevators require "qualified and trained" employees "to work safely around" the elevators; that is "Otis mechanics." Tr. 90. Mr. Phlipot acknowledged that upon #3 and #4 being turned over, BSI accepted responsibility for those two elevators. Tr. 67.

To "turn over" the elevators after they successfully pass inspection the elevator mechanic reviews the elevator's operation and gives operation keys to the property owner's representative. Tr. 60. At the Lennox Hotel, the owner's representative BSI reviewed #3 and #4 and received the keys from Ronnie Morris. Tr. 59-61. At this time, other than service work (meaning the elevators were in operating service, under the owner's control and having passed necessary inspections 98, 120-122) elevators #3 and #4 were not the elevator mechanic's control; the elevators belonged to the property owner and it, or its general contractor, had control.

With possession and control of elevator's #3 and #4 anyone the property owner entrusted with the appropriate key could stop the elevator and put in on "independent" service. Tr. 63, 198-

199, 210. "Independent" service is a term of art in the elevator industry. An elevator on "independent" service is locked in place, with the doors open. Tr. 63, 210-211. An elevator placed on "independent" service will remain in place and not respond to calls from other floors. Tr. 63. Until the elevator is removed from "independent" service, it does not move. Tr. 63. All it takes is the key in BSI's, the property owner and Otis's possession. Tr. 63.

**e. Mr. Phlipot and Mr. Morris**

Mr. Ronnie Morris began working for Otis at the Lennox Hotel in January 2015. Tr. 205. Mr. Morris's position on this job was to be the Mechanic-in-Charge. Tr. 205. Mr. Morris had been a mechanic with Otis for over ten years and had a reputation as being one of Mr. Phlipot's best employees. Tr. 31. As a Mechanic-in-Charge Mr. Morris' duties included foreman duties, leading two crews of workers, overseeing the project [Tr. 93, 205]; and he received 12.5% wage premium over the mechanic scale, or $57.63. Tr. 32. As a Mechanic-in-Charge the collective bargaining agreement also affords him personal discretion regarding some safety matters and elevator doors. Ex. E-3, p. 144 #20.

On June 26, 2015 Steve Phlipot demanded Mr. Morris park, lock and leave the doors to elevator #2 open when he left work at the end of his shift. Tr. 216. Mr. Morris agreed to lock out the elevator but refused to leave the door open. Tr. 216. Mr. Morris did not, however, block others access to #2. He informed Mr. Phlipot that "He [Mr. Phlipot] would have to find somebody else to leave them open. Tr. 226.

Because elevator #2 had not been inspected, much less passed inspection, Mr. Morris did not believe it was safe to leave the doors open without an elevator mechanic present. Tr. 217, 227. Steve Phlipot had known about Mr. Morris's concerns about leaving uninspected, unaccepted, elevators unattended. Tr. 207. He and Mr. Phlipot had spoken about it when Mr. Morris started on

the Lennox Hotel project. Tr. 207. When an elevator was not inspected or turned over to the property owner, Mr. Morris did not believe it safe for others to be an unattended elevator. Tr. 217, 227. He had never left open doors of uninspected, unaccepted, elevators. Tr. 222. Elevator's that had passed inspection that was a different matter. If an elevator had passed inspection the owner "can do whatever they want with them at that point." Tr. 228.

This is not an unreasonable concern from someone who has been an elevator mechanic, one of the best, for a number of years. Tr. 31 Mr. Morris did not want to be responsible for someone getting hurt in an uninspected, unaccepted, elevator because he had left doors open. Tr. 217. If Steve Phlipot wanted the responsibility, and an injury on their conscious, if someone got hurt, Mr. Morris was not stopping him from opening the doors. Tr. 226. Mr. Phlipot knew how to do it. Tr. 119. But Mr. Morris was not going to operate in a manner he believed was unsafe just because Mr. Phlipot commanded it. Tr. 220-221. Mr. Phlipot did not speak to Mr. Morris about elevators #3 and #4. He did not need to; those elevators had passed inspection and turned over to the property owner. Tr. 216.

Mr. Phlipot testified he never directed Mr. Morris to open the doors of elevator #2. He had just mentioned that at some point refinishing work would have to be done in elevator #2. Tr. 78

Mr. Morris did not hear about elevator #2 again until on or about July 9, 2015. Tr. 24, 218. Mr. Morris asked if the refinishing company could perform its work during the normal working day. Tr. 26. It could not because of Mr. Phlipot's preferred schedule. Tr. 27. Mr. Morris again refused to open doors to an uninspected, unaccepted, elevator without a trained mechanic present. He did not think it was safe for non-trained people to have access to an uninspected, unaccepted, elevator. Tr. 218, 220, 227. Neither did Otis mechanic Matt Boyd who was also on the call. Tr. 218. For the first time, after Mr. Morris had now twice refused an unsafe demand, Mr. Phlipot

mentioned, Local 3. Tr. 220. For the first time, at Mr. Phlipot's suggestion, Mr. Morris called Business Manager John Orr. Tr. 221, 226.

At Mr. Phlipot's direction Mr. Morris called Mr. Orr, explained Mr. Phlipot's demand and told Mr. Orr he was not going to accede to the demand. Tr. 222. Mr. Morris also relayed Mr. Phlipot's request to have Mr. Orr call him. Tr. 222.

On July 13, 2015 Mechanic-in-Charge Mr. Morris and his apprentice Gary Krawzik, gave notice of resignation. Tr. 30. Mr. Morris had received an offer to work for another elevator contractor on from a friend of his and Mr. Krawzik was going with him. Tr. 229-230. He accepted the offer because he did not want to travel any longer [Tr. 73, 224, 225], and issues with Mr. Phlipot's supervisory style. Tr. 224-225. Mr. Morris' leaving had nothing to do with being told to leave doors open. Tr. 224

**f. Otis and Mr. Boyd**

With Mr. Morris gone, on or about July 20, 2015 Mr. Phlipot turned his attention to mechanic Mr. Matt Boyd. Tr. 33, 255. Mr. Morris had worked for Otis his entire career. Tr. 251. Mr. Boyd began working on the project at the Lennox hotel in January 2015. Tr. 252.

Mr. Phlipot testified his specific demand to Mr. Boyd related to elevators #3 and #4 that had been turned over to BSI and the property owner. Tr. 33. That is not Mr. Boyd's recollection. Tr. 253, 255. Mr. Boyd testified Mr. Phlipot's demand related specifically to the uninspected, unaccepted, elevator #2, a cab he had never worked on. Tr. 254-255.

Mr. Phlipot wished for the car doors left open the evening of July 20, 2015 so Mid America could begin work on its subcontract. Tr. 30. Mr. Phlipot demanded Mr. Boyd "walk away" with the doors open at the end of his shift. Tr. 256. Mr. Morris did not refused to either park or lock

elevator #2, but he was not going to leave the doors on it open. Tr. 256-257. He did not leave the doors open. No doors were open on elevator #2. Tr. 30, 256.

As to elevator's #3 and #4, Mr. Boyd did not need to park and lock them, the general contractor, BSI, was using them and could park and lock those elevators the same as anyone else. Tr. 263. They had been turned over. Mr. Boyd called John Orr to inform him Mr. Phlipot was now asking him to "open the doors" and "walk away" and he was not going to do it. Tr. 258-259. Like Mr. Morris before, Mr. Boyd relayed Mr. Phlipot's request to have Mr. Orr call him. Tr. 259.

The next day, July 21, 2015, Mid America and Otis entered a contract for Mid America to refinish bronze in elevators #2-4 at the Lennox Hotel Ex. E-2(b).

Mr. Phlipot testified he never directed Mr. Boyd to open the doors of elevator #2. He had just mentioned that at some point refinishing work would have to be done in elevator #2. Tr. 78. Regardless, Mr. Boyd made a "personal choice" he though it unsafe to "walk away" from an uninspected, unaccepted, elevator with the doors open. Tr. 265. #2 was different then cars #3 and #4. They had been turned over and were not the mechanic's responsibility, they were the general contractor's responsibility. Tr. 267.

**g. Otis and Mr. Langendoerfer**

On August 6th and 7th Mid America refinished the bronze in elevators #3 and #4. Tr. 77. Mr. Phlipot requested Otis mechanic Vince Langendoerfer open the doors to #3 and #4 when he left for the day. Tr. 77, 271. Mr. Langendoerfer put #3 on "independent service." Someone else had already placed #4 on "independent service" so he did not need to do anything for that elevator. Tr. 271, 272-273. Before addressing #3 Mr. Langendoerfer consulted BSI's foreman. Tr. 272. Either one of them could have placed #3 on "independent service." Tr. 273. #3 and #4 had previously been safety inspected and tested. Tr. 274.

Mr. Phlipot testified he never directed Mr. Langendoerfer to open elevator #2's doors. Mr. Langendoerfer testified Mr. Phlipot did inquire into Mr. Langendoerfer's "feeling" regarding elevator #2 on the date he requested he leave #3 and #4's doors open. Tr. 275. Mr. Langedoerfer told Mr. Phlipot he did not "feel good about it" as it had not yet been safety inspected. Tr. 275.

Like Mr. Morris and Mr. Boyd before him, when it came to opening the doors of an uninspected, unaccepted, elevator and "walking away" the decision was his. Tr. 275. "If somebody were to get hurt, it could be [his] liability, so [he] just said no" to leaving #2 unattended. Tr. 275. But as to #3 and #4, "they had it inspected and a customer was using it. You know, it was no big deal." Tr. 275. But opening doors when he believes it is unsafe to the public? Mr. Langendoerfer believed that decision was his to refuse. Tr. 280-282.

**h. The job is complete**

The 10(k) hearing began at 9:53 a.m. on August 18, 2015. Tr. 4-5. The hearing ended at 7:17 p.m. Tr. 328. Just before the record closed, the Charging Party made an offer of proof that Mid America had begun refinishing bronze on the remaining elevator #2 at the Lennox Hotel. Tr. 325. It would be complete that evening or the next. Ibid. The whole bronze refinishing project therefore would last no longer than four (4) evenings.

## IV. ARGUMENT

### a. Introduction - "you'll do it because I told you to do it"

This case has nothing to do with the concerns Congress sought to address when drafting and passing §8(b)(4)(D) and 10(k) proceedings. This case has everything to do with Mr. Phlipot's personal attempt to bend bargaining unit members to his, not even Otis's, will. "YOU WILL DO IT BECAUSE I SAID YOU WILL" Tr. 221. This aspect of the case is true no matter how framed, and the Board should not allow itself to be used to advance Mr. Phlipot's personal agenda.

**b. There are neither competing claims nor rival groups of employees to the "disputed work"**

**i.** *No Competing Claims*

There is no §8(b)(4)(D) jurisdictional dispute without two completing claims of workers to particular work of a neutral employer. Sheet Metal Workers Local 18 (TOTAL Mechanical), 359 NLRB No. 56 (2013). There is no such dispute here.

The Charging Party wishes to frame this case in a manner not supported by either the record or common sense. The Charging Party's theory must be that in order to get Mid America to assign specific work to Local 3 members rather than its own employees Local 3 encouraged or induced its members to not open doors #2, #3 or #4. In reality, and as is supported by the record, IUEC Local 3's concerns were only with Otis, directly, and about two distinct matters:

(1) subcontracting work that should have been performed by an IUEC signatory contractor.

(2) supporting the safety concerns its members presented to it; and,

Mr. Phlipot conflated these in his mind and presented them to his superiors at Otis as a single issue. They are not.

**ii.** *Local 3's Concern Was Otis Subcontracting Work to Non-Signatory*

Among the many assurances, Otis presented BSI, it included two options regarding the elevator car enclosures for elevators #2-4:

(1) "The existing bronze front returns, entrance jambs and headers shall be refinished by a professional metals refinishing contractor hired by the Contractor [Otis] for this section." Or;

(2) In lieu of retaining the existing bronze front returns, remove and replace the return with a new return constructed of 16-gauge satin no. 4 bronze of equivalent size and shape as the existing. Otis Ex.3, P. 142100-18.

The IUEC / NEIEP training program has a specific module on option (2). Ex. E-7. Mr. Staggs maintained BSI chose option (1). Tr. 109. Neither option required Otis to use non-IUEC represented employees. Ibid. Otis' contract with BSI, however, did require the use of "union labor" if available. Ex. E-1, (BSI Subcontract Agreement, Ex. 1 #13, and Ex. 2 #2). Further, Otis' collective bargaining agreement with the international union also contemplated the bronze work in the cabs. Ex. E-3, Art. IV par. 2(j); Art. VIII(A).

The Board does not find jurisdictional disputes where a union claims work is being transferred out of a bargaining unit to another employer. Longshoremen Local 26 (American Plant Prot.), 201 NLRB 574 (1974). A 10(k) proceeding is not the place for the Board to "arbitrate disputes between an employer and a union, particularly with regard to the union's 'attempt to retrieve the jobs' of employees whom the employer chose to supplant by reallocating their work to others." Ibid. at 576. But this is exactly what the Charging Party wants the Board to do.

Less than a year ago the Board affirmed the principle that it would not be the arbiter of contractual subcontracting disputes. The Board affirmed prior rulings in Capitol Drilling and Laborers Local 81 (Kenny Construction Co.) that "absent a direct claim against the *subcontractor*, there were no competing claims to the disputed work and thus a true jurisdictional dispute did not exist." Int'l Longshore & Warehouse Union, Local 19 & Nat'l Constr. Alliance II & Pac. Nw. Reg'l Council of Carpenters & Seattle Tunnel Partners, A Joint Venture & Total Terminals Int'l, LLC, 361 NLRB No. 122 (Dec. 2, 2014). The Board similarly affirmed the exception, which does not apply in this case; that there is a jurisdictional dispute where "the general contractor, not the subcontractor, has "assigned the disputed work to its own employees, and thereby retains the authority to assign the disputed work." Ibid. *citing*, Kenny Construction, 338 NLRB at 978."

In this case the undisputed facts are that Local 3 and Otis' disagreement was not who Mid America was assigning work. The disagreement was whether Otis violated the NEPA / IUEC collective bargaining agreement in subcontracting work to Mid America in the first instance. There are NEBA signatory contractors who perform metal refinishing like of the type Mid America described. Tr. 311-312. In fact one of Otis's mechanics at the Lennox Hotel, Gary Krawzik had recently worked for one of these signatory companies. Tr. 235. Mr. Krawzik testified at length regarding his knowledge and ability to perform metal, including bronze, and refinishing work that he learned on the job in conjunction with his other formal apprenticeship training.

Otis did not seriously consider *any* subcontractor other Mid America. Otis chose Mid America not on ability or skill, but on "cost" and "price" Tr. 53-54, 109, 155. Otis chose Mid America to avoid the very heart of what subcontracting, signatory and security clauses are designed to prevent.

Neither in negotiating nor renegotiating its agreement with Mid America on July 21, 2015 did Otis demand Mid America sign a one-job agreement with the IUEC, or train an Otis employee to help a Mid America foreman on the job.[2] In unilaterally hiring Mid America in the manner it did Otis breached both the NEBA / IUEC agreement and its agreement with BSI to provide only 'union' labor.

The facts of this case mimic those situations the Board has rightly eliminated from §10(k) coverage. To hold otherwise is encouraging Otis and others to use the NLRB to void at will lawful and voluntary signatory clauses. Laborers Int'l Union of N. Am., 318 NLRB 809, 811-12 (1995). There is no claim from Local 3, Mr. Morris, Mr. Boyd or Mr. Langendoerfer upon Mid America.

[2] An easy proposition as this job was to last, at most, 4 evenings. Mid America puts apprentices in the field after only 2 days of video training, some of which concerns non-work information such as the company's history. Tr. 163. Certainly, an accommodation could be made concerning the two-day video training.

There is no dispute with Mid America to their assignment under their contract. As more fully explained below, neither Local 3 nor its members prevented Mid America from working, much less for a proscribed purpose. §8(b)(4)(D) allegations and resulting 10(k) proceeding are not sufficiently triggered in this case. Ibid. The Notice of Hearing must be quashed.

**c. No competing groups of employees**

The only 'groups' 'competing' or engaged in any 'rivalry' in the record are the Charging Party, by Mr. Phlipot and Staggs on one side and Local 3 and members Messrs. Morris, Boyd and Langendoerfer on the other. Mid America itself was not involved in the dispute in anyway until the hearing. No Mid America employee testified.

The only testimony regarding Mid America's employees working at the Lennox Hotel came from Regional Vice President Brandon Donat. Even there, Mr. Donat explicitly testified he Mid America had never been contacted by anyone from Local 3. Tr. 155. Neither did he testify to having contact with Messrs. Morris, Boyd or Langendoerfer. Most importantly, Mr. Donat did not testify his company or its employees were prevented from doing any work at the Lennox Hotel.

The Charging Party will likely point to both Swartley Brothers Engineers, Inc. 337 NLRB 1270 (2002) and Millennium Construction, 336 NLRB 1002 (2001) for the proposition that performance of work by a group of employees is evidence enough of a claim to that work by those employees. Millennium Construction, 336 NLRB 1002, 1003. If they are applicable, under the Board's current §10(k) jurisprudence Mr. Donat's simple comment that he would "prefer" to have his employees work for him may be enough to find his employees are claiming the work. Tr. 155. It should not be enough. This jurisprudence only functions to turn §10(k) into an employer's sword rather than and neutral employer's shield. Regardless, on these facts those cases are not applicable.

Unlike Millennium, on July 20, 2015, the date Mr. Phlipot said Mr. Boyd refused his

command, there were no Mid America employees working, or preparing to work. Mid America's contract was finalized with a change the next day. Ex. E-2(b). Unlike Swartley Brothers, there is no picketing or other cessation of work on the part of Local 3's members. As will be more fully explained below neither Local 3, its members or anyone else ever sought to, or did, prevent Mid America from performing its contract with Otis. The record does not establish a jurisdictional dispute between two groups of employees. The record portrays Otis attempting to create a dispute with Local 3 and placing Otis employees and Mid America in the middle. Teamsters Local 578 (Uscp-Wesco) 280 NLRB 820 (1986). Such a dispute is not cognizable under §10(k). Ibid. The Board should quash.

**d. No proscribed means to enforce**

In the unfortunate event the Board finds the first prong required to find a "reasonable cause" Local 3 somehow made a claim for bronze refinishing work from Mid America and violated §8(b)(4)(D); the second prong needed to trigger a §10(k) hearing is also absent. In the case of either the inspected or uninspected, unaccepted, elevators, neither Local 3 nor Messrs. Morris, Boyd or Langendoerfer refused to perform work they normally performed as Otis elevator Mechanics or threatened the same.

**i.** *No strike or partial strike*

The National Labor Relations Board reasons that a partial strike or work stoppage is unprotected because it constitutes the putative strikers' attempt to set their own terms or conditions of employment in defiance of their employer's authority. Johnnie Johnson Tire Co., 271 NLRB 293, 295 (1984), *citing*, Audubon Health Care Center, 268 NLRB 135 (1983). The Board further defined a partial strike as involving "employees refusing to work but remaining in their work areas or withholding the labor from certain portions of their work while continuing to perform other

portions." Ibid. This criteria does not apply to the turned over elevator's #3 or #4 or the uninspected, unaccepted, elevator #2.

**ii.** *No proscribed means as to 3 and 4*

According to Mr. Phlipot, he only ever wanted elevators #3 and #4 opened. Tr. 26. This is aspect of Mr. Phlipot's testimony is contrary to every other witnesses' understanding. Everyone else all agreed #2 was the only elevator at issue. Even if Mr. Phlipot is to be credited, everyone agrees that at any time after April 24, 2015 the general contractor, BSI, and the property owner had control of elevator's #3 and #4. Tr. 57. The elevator mechanics did not.

Mr. Phlipot's demand that only an Otis mechanic could open #3 and #4 was unnecessary for any practical or rational reason. "YOU WILL DO IT BECAUSE I SAID YOU WILL." Tr. 221. Mr. Phlipot did not get his way so he appealed to John Orr and Jim Staggs. Though they disagreed about a lot, they both agreed Mr. Phlipot, or anyone BSI or the owner designated could safely prepare elevators #3 and #4 with doors open. But, if Mr. Phlipot is to be believed, he wanted the Otis mechanics to do it, because he said he SAID YOU WILL. Tr. 221. Under this scenario, there is no "partial strike" and the Otis employees did not use proscribed means to enforce anything. This is not an §8(b)(4)(D) issue the Board need proceed upon for a 10(k) determination. No one was stopping #3 and #4 from being opened and the mechanics were not needed to perform that task. In fact, on the evening of July 20, 2015 Mr. Phlipot was at the Lennox Hotel. Tr. 73. He did not open the doors to #3 and #4 himself, even though he was capable. Tr. 119.

**1.** Mr. Morris

Regarding #3 and #4, the record does not indicate what portions of his job duties Mr. Morris refused to perform. Mr. Morris was no longer even under Mr. Phlipot's or Otis's employ on July 20, 2015. Tr. 223. Mr. Morris specifically stated his separation had nothing to do with Mid

America, bronze or a request to open doors on any elevator at the Lennox Hotel. Tr. 224. Mr. Morris free to terminate his employment as he sees fit. *See,* U.S. Const. amend. XIII.

**2.** Mr. Boyd

Regarding #3 and #4, the record does not indicate what portions of his job duties Mr. Boyd refused to perform

If Mr. Phlipot's testimony is credited, that he only wanted #3 and #4 opened, the record reflects he was ordering Mr. Boyd and Mr. Morris to do additional work not required of them. Further, even if and Mr. Boyd refused to open #3 and #4 on July 20, 2015, this is not a partial strike under the Board's analysis. Mr. Phlipot's demand to open #3 and #4, if believed, was nothing more than a demand to perform a task for another employer or party, not for Otis. Three Fountains Nursing Ctr., 184 NLRB 294, 299-300 (1970). The NEBA / IUEC collective bargaining agreement between establish an elevator mechanic's job duties. The mechanics' duties do not include doing the work of the general contractor, BSI or the property owner. There is no evidence that placing inspected and turned over elevators on independent or other service is a required element of the mechanics' job. KNTV, Inc., 319 NLRB 447, 452 (1995).

**3.** Mr. Langendoerfer

Mr. Langendoerfer alone agrees he was asked to open doors on elevators #3 and #4 in August 2015. Tr. 271. In fact, he did. Tr. 271. Before doing so he consulted with BSI's foreman. Tr. 272. It was, after all, BSI's elevator at this point. Though Mr. Langendoerfer only turned one elevator to independent service, Otis does not seem to have an issue with his actions.

Mr. Langendoerfer's ultimate act of placing one of the two elevator cars on independent service does not change the analysis regarding Mr. Morris or Mr. Boyd. Mr. Langendoerfer's is

evidence of his actions alone, "not his obligations to" Otis. KNTV, Inc., 319 NLRB 447, 452 (1995).

**4.** Otis, the Lennox Hotel and Mid-America had access to #3 and #4 at their will

Mid America and Otis did not sign a controlling subcontract to perform bronze refinishing work at the Lennox hotel until July 21, 2015, almost two (2) months after elevators #3 and #4 were turned over to BSI and the property owner. Ex. E-2(b). This timing is important because there exists a prior contract that does not include the full scope of work needed. Ex. E-2(a). The reasonable assumption made in light of Mid America and Otis's silence is that on July 20, 2015, when Mr. Phlipot says he demanded Mr. Boyd park and lock #3 and #4 Mid America's agents or employees *did* see the inside of the elevators. Mr. Phlipot was certainly there. Tr. 73.

Mid America was likely inside and discover discovered it needed to renegotiate its contract with Otis.

Neither Mr. Boyd nor Local 3 had prevented Mid America from doing anything. The contract between Otis and Mid America only required Otis to provide arrangements for access to the cars. Ex. E-2(a). This happened. Further, Mid America accessing elevators itself is in keeping with its normal practice. Mid America routinely opens doors themselves, and walks in. Tr. 197-198. Mid America's contract with Otis specifically incorporates this practice: Mid America will open the doors with its "safety watch person" and, if it cannot get in, it will notify "building management." Ex. E-2(b) p. 3. There was nothing for Otis or Local 3 members to do. As Mr. Boyd testified regarding #3 and #4, "we didn't have to do that, the contractor [BSI] was using them. Tr. 263. Mr. Staggs confirmed that is Local 3's position as well. Tr. 105.

**iii.** *No proscribed means as to 2*

Otis' representatives and the Local 3 members who testified agree; when it came to a question of whether to open doors, only the uninspected, unaccepted, elevator, #2, is at issue. Mr. Staggs, Mr. Morris, Mr. Boyd, Mr. Langnedoerfer and Mr. Orr all believed #2 is the only cab that matters in this dispute.

If instead of Mr. Phlipot being credited the Board recognizes he was at all times refereeing to the uninspected, unaccepted, elevator #2, this is still not a §8(b)(4)(D) issue requiring 10(k) intervention.

**1.** Mr. Morris

Mr. Morris' only concern was with elevator #2. If Mr. Phlipot is credited, he never asked Mr. Morris to open doors on the uninspected, unaccepted, #2. Tr. 26. If that is the case, Mr. Morris certainly could not have refused an order never given.

Additionally, just as Mr. Phlipot admitted no one was stopping Mid America from performing work on #3 or #4; he also admitted no one was stopping Mid America from performing work on #2. On June 26, 2015, when Mr. Morris was first asked to "park car number 2 at the bottom floor with the doors open" Mr. Morris did park and lock the elevator. Tr. 216. He simply told Mr. Phlipot "he would have to find somebody else to leave [the doors] open." Tr. 216. Mr. Phlipot demurred because he could not schedule the refinishers the following week anyway. Tr. 217.

When Mr. Morris returned to the job after his vacation, the question of elevator #2 resurfaced. Mr. Phlipot testified that on July 9, 2015 Mr. Morris did not say he would not allow Mid America to work. Mr. Phlipot's testimony was that Mr. Morris would not acquiesce to Mid America performing work in an uninspected, unaccepted, elevator without a trained elevator

mechanic present. Mr. Morris was not going to be the one to open doors to an uninspected, unaccepted, elevator, but he was neither going to stop anyone else from taking that responsibility.

When asked to "park the cars on the evening of July 20th so that Mid America could come in and perform their work" Mr. Morris' response was "could they [Mid America] do that work during the day." Tr. 26. Mr. Phlipot had apparently scheduled metal refinishers when mechanics were present before. Tr. 79-80. Why then could Mid America not perform work during the day? Its agreement with Otis certainly allowed it. Ex. E-2(a)(b). The only reason Mid America could not perform its working during the day when a trained elevator mechanic was present was because Mr. Phlipot, "said no, that I had it scheduled for the evening." Tr. 27.

Finally, as to #2, Mr. Morris was no longer even under Mr. Phlipot's or Otis's employ on July 20, 2015. Mr. Morris specifically stated his separation from Otis had nothing to do with Mid America, Bronze or a request to open doors on any elevator at the Lennox Hotel.

**2.** Mr. Boyd

Mr. Boyd was not going to be the one to open doors to an uninspected, unaccepted, elevator, but he was not stopping anyone else from taking that responsibility upon themselves. Mr. Boyd actually never had control, or worked on elevator #2. Tr. 255. And he was not going to take control of it. This did not stop Mr. Phlipot from calling him on July 20th, 2015, asking #2's status, and demanding that, at the end of the day he "lock it out and leave it with the doors open" and "walk away." Tr. 255-256.

Mr. Boyd did not refuse to park or lock #2, but he was not going to leave the doors open on an elevator that had not been accepted by the general contractor and property owner. Tr. 256. Mr. Phlipot already knew this was going to be Mr. Boyd's answer; he had been involved in the telephone conversation between he and Mr. Morris on July 9, 2015. Tr. 258. Mr. Boyd "didn't feel

comfortable:" and "didn't want to be liable for an injury or anything that may happen." Tr. 259. The week after July 20the and the 21st Mr. Boyd worked overtime in the evenings at the Lennox Hotel. Tr. 261. Despite a trained mechanic being available however, Mr. Phlipot did not schedule Mid America to work that week.

**3.** Mr. Langendoerfer

Mr. Langendoerfer was not going to be the one to open doors to an uninspected, unaccepted, elevator, but he was not stopping anyone else from taking that responsibility upon themselves. He was not going to open the doors to an uninspected, unaccepted, elevator because if someone were to get hurt, it could be his liability. Tr. 275. Elevators that had been turned over are a different matter. Tr. 283. Mr. Phlipot never asked him to open #2. Tr. 273

**4.** Mechanics' decisions related to #2 were reasonable and their own

**A.** *Liability and others' safety was the concern, not bronze*

None of the three mechanics who refused to open doors of uninspected, unaccepted elevator #2 mentioned anything about their desire for Mid America to hire them. None of the three mechanics who refused to open the doors of uninspected, unaccepted elevator #2 mentioned anything that could be possibly interpreted as an act to force Mid America to assign them bronze refinishing work. All of the, however, stressed their sincere belief that opening the door of an uninspected, unaccepted elevator opened them to liability if another person were injured. Tr. 227-228, 259, 267, 275-283.

This is not an idle concern. Missouri Courts still enforce the acceptance doctrine as an affirmative defense. Upon acceptance by an owner of work, the acceptance doctrine provides a contractor a complete defense of liability to third parties who have no contractual relations with him based upon for damages sustained by reason of a contractor's negligence in the performance

of his contract duties. Roskowske v. Iron Mountain Forge Corp., 897 S.W.2d 67, 71 (Mo. Ct. App. 1995). An exception to the doctrine is available but requires a plaintiff to establish (1) the defect is imminently dangerous to others, (2) the defect is so hidden that a reasonably careful inspection would not reveal it, and (3) the contractor knows of the defect, but the owner does not. Ibid. The acceptance doctrine has at its core the concept of control. Weber v. McBride & Sons Contracting, Co., 182 S.W.3d 643, 645 (Mo. Ct. App. 2005).

The Charged Party asked multiple witnesses is they believed an uninspected elevator was dangerous for an Otis, or elevator employee. *E.g.* 196. These questions are misleading and completely miss the point. In refusing to let untrained persons into an uninspected, unaccepted elevator, the concern is not that another trained mechanic would be injured. The concern is is a the layperson could be injured without a trained mechanic present to mitigate any injury, potentially leaving the mechanic liable. Tr. 227-228.

Further, with Otis being a national company and the job here being performed in Missouri by Missouri residents the likelihood of a mechanic being named as a personal defendant theoretically increases. The mechanic would help destroy diversity jurisdiction for a cunning plaintiff's attorney in the event of an injury. *See generally*, Lincoln Property Co. v Roche, 546 US 81 (2005). Unlike the Charging Party, the Board thankfully recognizes that workers' interests in safety for the public, not just themselves, is legitimate. Springfield Air Center, 311 NLRB 1151, 1155 (1993).

Messrs. Morris, Boyd and Langendoerfer's explanations of their concerns regarding elevator #2 as opposed to elevators #3 and #4 perfectly reflect the acceptance doctrine. When an elevator is out of service and they are working on it, they are the mechanics in control of it. Tr. 212, 216, 220, 227, 228, 306. When a cab is turned over, however, it has passed inspection and the

customer has accepted the elevator. Tr. 198, 200, 210, 212. If an Otis mechanic waits until after a state inspection and an elevator is turned over to the owner before allowing non-trained people onto the elevator, he or she has complete defense under the acceptance doctrine. The property owner has accepted it and it has, by definition, undergone a "reasonably careful inspection." This is why Mr. Morris, Mr. Boyd, Mr. Langendoerfer and Mr. Orr all agreed, the property owner, or general contractor can do whatever it wants with an elevator after it had been turned over.

Otis's and Mr. Phlipot's prior accounts of outside contractors accessing uninspected, unaccepted elevators further supports the mechanic's understanding of the acceptance doctrine's application. Of the seven (7) examples Mr. Phlipot mentioned where outside contractor accessed Otis cabs during modification projections, he could only remember one where a the access was before inspection and a trained mechanic was not present. Tr. 79-83. In that one instance, it was a non-testifying mechanic, Carrie Kerr, who opened the doors of an uninspected elevator and left. Tr. 81. There is no testimony on the state of the cab in question at that point. Maybe Carrie Kerr believed the likelihood of something happening to third party was low enough that the risk of personal liability was low. Regardless, that was Carrie Kerr's decision at that time for that elevator. It does not vitiate the reasonably and sincere beliefs of the mechanics in this matter. The Mechanics in this case were concerned for their liability and other people's safety, not their own. Tr. 231, 232, 281.

**B.** *Decisions were their own*

Members making their own individual choices does not constitute "inducement and encouragement" in the §8(b)(4) context. Building & Construction Trades Council of Tampa and Vicinity Local 397 (Tampa Sand and Material Co.), 132 NLRB 1564, 1565-1566 (1961). If there is no compulsion from the union under threat of discipline, there is no §8(b)(4) violation.

Manufacturers Woodworking Ass'n of Greater New York Inc. & Peterson Geller Spurge, Inc. & Patella Mfg., Inc., 345 NLRB 538, 541 (2005). This is what happened at the Lennox Hotel, free men made their own choices. They were not following any dictate or command from Local 3, especially under threat of any discipline.

Mr. Morris had twice refused to open the doors of an uninspected, unaccepted, elevator #2 before Local 3 was even involved in any conversation with Otis about the Lennox Hotel. Tr. 220, 221, 226. Local 3 only became involved at Mr. Phlipot's insistence. Tr. 221, 226. Mr. Morris told Local 3 Mr. Phlipot demanded he open the doors to an uninspected elevator and he was not going to do it. Tr. 222. This is a statement from Mr. Morris to Local 3, not a command from Local 3 to Mr. Morris. Local 3 never "instructed either way to leave them open or leave them closed." Tr. 226. The decision was Mr. Morris', based upon his beliefs. As a Mechanic-in-Charge the collective bargaining agreement arguably gave him that discretion. Ex. E-3, p. 144 #20.

Similarly, Mr. Boyd and Mr. Langendoerfer, affirmed their personal decisions to not leave open door of uninspected, unaccepted, elevator #2. Mr. Boyd "I made a personal choice" Tr. 265. Mr. Boyd agreed with his Mechanic-in-Charge on July 9, 2015 when they spoke to Mr. Phlipot. Tr. 218. Mr. Langendoerfer concurred.

Upon aggressive cross examination Mr. Langendoerfer affirmed when it came to opening the doors of an uninspected, unaccepted elevator that may not be safe for the public, "its up to me. It's my decision and whether or not – if somebody were to get hurt, it could be my liability, so I just said no." Tr. 275. This stance was his, not Local 3's. Tr. 280.

**iv.** *No Threat from Local 3*

The subcontracting matter and safety regarding elevator #2 are two distinct issues. Tr. 297. It is Mr. Phlipot who conflated them when he approached Mr. Staggs. Tr. 102. The Local never

instructed its members to not open doors, or park cars, for the purpose of obtaining bronze refinishing work from Mid America. Tr. 310-311. The Local never threatened Otis it would direct its members to not open doors, or park cars, for the purpose of obtaining bronze refinishing work from Mid America. Tr. 310-311. But neither was the Local going to command Mr. Morris or Mr. Boyd that they had to perform in a manner they believed was unsafe. Tr. 311. The Local does not make the call what is safe and what is not, the members do. Tr. 311.

Mr. Phlipot's testimony on direct examination is riddled with magic words intended to invoke a §10(k) award. Knowing the Board does not make credibility determinations he is free to do so. The Board explicitly allows it in §10(k) hearings. But Mr. Phlipot's testimony on direct examination is contrary to nearly every other witness and participant in these conversations, and their understanding of how the industry works. Even Kone employee Mr. Lenzen explained that metal refinishers do not go into uninspected, unaccepted elevators to work. They push the button and walk in themselves. Tr. 197, 200-201.

Mr. Phlipot's testimony can easily be reconciled with every other witness, and the substance of his testimony remain unchanged if instead of remembering John Orr telling him he would not "let" [Tr. 76] members park the car he would not "make" members park a car. But there are no magic words invoking §10(k) in that testimony. The matter is the same with Mr. Staggs.

Here are the consistent aspects through all testimony. #3 and #4 were not in Otis' mechanics' control at any time relevant to this hearing. #2 had not been accepted by the property owner or general contractor. Anyone with a key could place #3 and #4 on independent service at will, as is industry practice. Any Otis superintendent, even Mr. Phlipot, could lock and open doors on #2 as he wished, no one was stopping them. Local 3 was prepared to file a grievance over subcontracting bronze refinishing work in the elevators.

The Board recognizes a good faith claim under a collective bargaining agreement, including a grievance, or even a § 301 lawsuit, does not violate §8(b)(4)(D). *See. e.g.*, Miron Constr. Co. v. Operating Eng'rs Local 139, 44 F.3d 558 (7th Cir. 1995); Roofers Local 30 (Gndle Lining Constr. Corp.), 307 NLRB 1429 (1992), *enforced*, 1 F.3d 1419 (3d Cir. 1993). Therefore, the only "threat" in the record that could possibly invoke a §10(k) determination comes from specifically allowed hearsay statements from Mr. Staggs and Phlipot, parties in interest. Statements that are contrary to every other witness and all witnesses understanding of the elevator industry. The Board should be cautious on allowing itself to be used as Mr. Phlipot is demanding and find "reasonable cause" to invoke §10(k) based upon this record.

## V. CONCLUSION

For the foregoing reasons the Notice of §10(k) hearing must be quashed.

Respectfully submitted,

HARTNETT GLADNEY HETTERMAN, LLC

/s/ James P. Faul
JAMES P. FAUL
4399 Laclede Ave.,
St. Louis, Missouri 63108
Telephone: 314-531-1054
Facsimile: 314-531-1131
jfaul@hghllc.net
Attorneys for IUEC Local 3

Certificate of Services

I hereby certify that the forgoing was served on all parties of record listed below by the Board's E-Filing System, and email to the following:

Daniel Hubbel
National Labor Relations Board
1222 Spruce Street, Room 3.02
St. Louis, Missouri 63103-2829
Daniel.Hubbel@nlrb.gov

Timothy E. Copeland, Jr., Esq.
28 Vernon Street, Suite 501
Brattleboro, VT 05301
tcopeland@drm.com
Attorney for Otis Elevator Company

Terry L. Potter, Esq.
Husch Blackwell, LLC
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
(314) 345-6438
Terry.Potter@huschblackwell.com
Attorney for Involved Party Renaissance Metals, Inc. d/b/a Mid America Metals

/s/ James P. Faul